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1 QUINN EMANUEL URQUHART & SULLIVAN, LLP

Charles K. Verhoeven (Bar No. 170151)

2 charlesverhoeven@quinnemanuel.com

Melissa Baily (Bar No. 237649)

3 melissabaily@quinnemanuel.com

Lindsay Cooper (Bar No. 287125)

4 lindsaycooper@quinnemanuel.com

50 California Street, 22nd Floor

5 San Francisco, California 94111-4788

Telephone: (415) 875-6600

6 Facsimile: (415) 875-6700

7 Attorneys for GOOGLE, LLC

8
9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 SAN FRANCISCO DIVISION

12 SONOS, INC.,

13 Plaintiff,

14 vs.

15 GOOGLE LLC,

16 Defendant.

CASE NO. 3:20-cv-06754-WHA

Related to CASE NO. 3:21-cv-07559-WHA

**GOOGLE LLC'S OPPOSITION TO
SONOS, INC.'S MOTION FOR LEAVE
TO AMEND INFRINGEMENT
CONTENTIONS PURSUANT TO
PATENT L.R. 3-6**

Date: March 24, 2022

Time: 8:00 a.m.

Location: Courtroom 12, 9th Floor

Judge: Hon. William Alsup

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1 **I. INTRODUCTION**

2 Sonos’s eleventh hour attempt to amend its infringement contentions—for the *eighth* time
 3 and with a hearing scheduled *only three weeks* before the patent showdown summary judgment
 4 deadline—is highly prejudicial to Google and should be rejected. The summary judgment deadline
 5 is on April 14, 2022 (Dkt. No. 68), and Sonos’s amendments introduce multiple new theories for
 6 how Google allegedly infringes claim 13 of U.S. Patent No. 9,967,615 (the “’615 patent”). Google
 7 selected this claim for the showdown based on Sonos’s existing contentions, and should not be
 8 required to defend against new theories that should have been presented long ago.

9 Sonos asserts that good cause exists to add its new infringement theories—which relate to
 10 the “resource locator” and “local playback queue” limitations that appear in each claim of the ’615
 11 patent—solely on the basis that the Case Management Order (Dkt. 67) and this Court’s holding in
 12 *Fluidigm Corp. v. IONpath Inc.*, No. C 19-05639 WHA, 2020 WL 5073938 (N.D. Cal. Aug. 25,
 13 2020) permit disclosure of “backup” contentions made in response to the opposing party’s claim
 14 constructions. But Sonos’s characterization of its proposed amendments as “backup” theories is
 15 misleading. Sonos’s additions are affirmative theories that fall within Sonos’s own construction of
 16 the claim limitations at issue, and thus should have been disclosed in its October 21, 2021
 17 infringement contentions pursuant to Patent Local Rule 3-1. *Fluidigm* does not permit a patentee to
 18 hold back infringement theories it was aware of until after claim construction. *Fluidigm*, 2020 WL
 19 5073938, at *4 (“[U]nder the current [Patent Local Rules], ‘parties should proffer *all* of the theories
 20 of infringement [or invalidity] that they in good faith believe *they can assert*.’”) (citing *Apple Inc.*
 21 *v. Samsung Elecs. Co.*, No. 12-CV-0630-LHK PSG, 2013 WL 3246094, at *3 (N.D. Cal. June 25,
 22 2013) (emphasis in the original)). As such, Sonos has failed to meet its burden of demonstrating
 23 that there is good cause for its proposed amendments. Sonos has provided no explanation, much
 24 less good cause, as to why it could not have provided the additional theories it now proposes in any
 25 of its prior contentions or amendments. Sonos has had access to Google’s source code and technical
 26 documents *since March 5, 2021* and has served seven sets of amended contentions since then.

27 Moreover, given that the proposed amendments relate to the claim Google has selected for
 28 the upcoming patent showdown, Sonos’s attempt to add multiple new theories is severely prejudicial

1 to Google. Indeed, opening summary judgment briefs are due just two months from now and only
 2 three weeks after the hearing on Sonos’s current motion. Google selected claim 13 for the patent
 3 showdown and its proposed claim terms for construction based on the infringement contentions
 4 Sonos disclosed four months ago. As this Court explained in *Fluidigm*, “[o]ur patent local rules
 5 ‘require parties to crystallize their theories of the case early in the litigation **and to adhere to those**
 6 **theories once they have been disclosed.**’” *Fluidigm*, 2020 WL 5073938, at *3 (emphasis added).
 7 Sonos’s “‘shifting sands’ approach” is precisely what the Patent Local Rules were designed to
 8 prevent. *Verinata Health, Inc. v. Ariosa Diagnostics, Inc.*, 236 F. Supp. 3d 1110, 1113 (N.D. Cal.
 9 2017). Requiring Google to defend against new theories disclosed on the eve of a fast-approaching
 10 patent showdown would be highly prejudicial in any case, but is especially prejudicial here where
 11 Sonos’s recent damages disclosure alleges that it is entitled to up to a [REDACTED] reasonable
 12 royalty for the asserted cloud queue patents (which includes the ’615 patent). Ex. 1 at 26.

13 Because Sonos fails to plausibly provide “good cause” for disclosing its proposed
 14 amendments at this late stage, and taking into account the substantial prejudice they would cause
 15 Google, Sonos’s motion should be denied.

16 **II. STATEMENT OF ISSUES TO BE DECIDED**

17 Whether good cause exists under Patent Local Rule 3-6 for Sonos to amend its infringement
 18 contentions as to the ’615 patent where the proposed amendments should already have been
 19 disclosed pursuant to Patent Local Rule 3-1, Sonos has failed to act diligently, and Google will be
 20 severely prejudiced by Sonos’s ever-changing infringement contentions.

21 **III. STATEMENT OF FACTS**

22 **A. Sonos Receives Google Source Code And Technical Documents And Serves 23 Five Sets Of Infringement Contentions In The Western District of Texas**

24 On September 29, 2020, Sonos filed its original complaint against Google in the Western
 25 District of Texas. Dkt. 1. In accordance with Judge Albright’s Order Governing Proceedings, Sonos
 26 served its preliminary infringement contentions on December 11, 2020. Declaration of Nima Hefazi
 27 (“Hefazi Decl.”) ¶ 2. On January 8, 2021, Sonos served its first supplemental preliminary
 28 infringement contentions. *Id.* ¶ 3.

On March 5, 2021, Google produced its technical documentation and source code for the accused products. *Id.* ¶ 4; Dkt. 48. Sonos thereafter amended its contentions three more times. Specifically, Sonos served second supplemental preliminary infringement contentions on June 5, 2021, third supplemental infringement contentions on July 14, 2021, and “final” infringement contentions on September 10, 2021. *Id.* ¶ 5.

B. Following Transfer, Sonos Serves Infringement Contentions Pursuant To Patent Local Rule 3-1 That Purport To Disclose Only “Exemplary” Theories

On October 21, 2021, after this case was transferred to the Northern District of California, Sonos served another set of infringement contentions (its sixth set overall) pursuant to this District’s Patent Local Rule 3-1. *Id.* ¶ 6. Google wrote Sonos a letter two weeks later, on November 3, 2021, identifying deficiencies in Sonos’s infringement contentions. Dkt. 86-3.

For the ’615 patent that is the subject of Sonos’s current motion, Google identified deficiencies with respect to the following limitation (which appears in all the asserted claims) that requires “adding, to [a] local playback queue, one or more resource locators”:

causing one or more first cloud servers to add multimedia content to a local playback queue on the particular playback device, wherein adding the multimedia content to the local playback queue comprises the *one or more first cloud servers adding, to the local playback queue, one or more resource locators*.

’615 patent, claim 13 (emphasis added). More specifically, Google explained that Sonos had failed to specifically identify functionality that satisfied the requirement of a “local playback queue.” Dkt. 86-3 at 3-4. Google further noted that for the “resource locator” limitation, Sonos’s contentions employed open-ended “*e.g.*” language, and that such open-ended language was improper because Sonos must disclose all its theories in the contentions. *Id.*

C. The Parties Exchange Their Claim Construction Disclosures And Sonos Serves Its Court-Ordered Supplemental Infringement Contentions

Because Sonos initially refused to cure the deficiencies identified in Google’s letter, Google was forced to file a letter for discovery relief on December 17, 2021. *See* Dkt. 87. In its response, Sonos agreed to strike the open-ended “*e.g.*” language in its contentions. *See* Dkt. 96 at 3. After a short hearing, the Court ordered Sonos to serve supplemental contentions that “beef[] up” its

1 contentions” and “do a good job” clarifying its infringement theories for how the “local playback
2 queue” and “resource locator” limitations are met. Ex. 2 at 13:10-13.

3 The parties exchanged proposed terms for construction in compliance with Patent Local Rule
4 4-1 on December 20, 2021. Hefazi Decl. ¶ 7. Pursuant to Patent Local Rule 4-2, the parties
5 simultaneously exchanged their proposed preliminary constructions for these selected claim terms
6 on January 10, 2022. *Id.* ¶ 8.

7 On January 20, 2022, after it received Google’s proposed claim constructions, Sonos served
8 its Court-ordered supplemental contentions. *Id.* ¶ 9. Those supplemental contentions did *not*
9 include its new theories for the “resource locators” and “local playback queue” terms. *Id.*

10 **D. Sonos’s Motion for Leave to Amend and Proposed Amendments**

11 Despite serving its additional Court-ordered contentions only two weeks prior, Sonos
12 notified Google that it intended to move for yet another amendment of its infringement contentions
13 on February 4, 2022. Ex. 3. Google requested more information regarding Sonos’s proposed
14 changes, but Sonos refused to provide any on the grounds that it was still “compiling” the additional
15 contentions and proceeded to file the instant Motion on February 7, 2022. *Id.*

16 The new proposed infringement theories Sonos seeks to belatedly add to this case are
17 directed at the *same* “resource locator” and “local playback queue” limitations for which Google
18 previously sought the Court’s assistance. *See* Dkts. 87 at 1-2, 128 at 2. Although the Court already
19 ordered Sonos to provide fulsome contentions for these limitations, Sonos still withheld certain
20 theories of infringement from its supplemental disclosure on January 20, 2022, and now attempts to
21 pull an end run by requesting to add yet another set of amendments.

22 Sonos’s latest permutation of its theories substantially broadens the case and the relevant
23 YouTube application functionality at issue. Regarding the “resource locators,” Sonos’s existing
24 contentions (served prior to its “backup” contentions) allege that Google’s YouTube application
25 receives a “videoID” and purports to identify three separate theories for what constitutes the “local
26 playback queue” to which the videoID is added. Sonos’s motion now seeks for the first time to add
27 a new and different theory in which uniform resource locators (“URLs”) stored in a “variable called
28 video_data.ts→ dashManifest” are “resource locators.” Dkt. 127-4 at 38-42. But this variable can

1 be found in the source code that Google produced on March 5, 2021, almost a year ago, and that
 2 Sonos has had ample opportunity to inspect since then. Worse yet, even now, Sonos *still* does not
 3 identify the “local playback queue” that the URLs are allegedly added to.

4 Sonos also presents two new theories based on the doctrine of equivalents (“DOE”), which
 5 were not mentioned in any of Sonos’s prior infringement contentions. First, Sonos acknowledges
 6 that the claims require the control device to “cause” the resource locator to be added to the “local
 7 playback queue” on the playback device as part of the transfer, but now tries to read out this
 8 limitation by contending that “indirectly” adding URLs is a “trivial difference” covered by DOE.
 9 *Id.* at 42-43. Second, with respect to the “local playback queue” limitation, Sonos now argues that
 10 having “multiple data variables” that allegedly maintain an ordered list of media items is not
 11 substantially different than having a “local playback queue” data structure. *Id.* at 43-44.

12 **E. The Upcoming Patent Showdown**

13 Pursuant to this Court’s order regarding the patent showdown, the parties each selected one
 14 claim for the showdown on November 11, 2021. Dkt. 68 ¶ 1. Google selected claim 13 of the ’615
 15 patent. *See* Dkt. 87 at 3. Opening summary judgment briefs are due on April 14, 2022 for the patent
 16 showdown, less than two months from now and three weeks after the hearing on Sonos’s Motion.
 17 *See* Dkt. 68 ¶ 4.

18 **IV. LEGAL STANDARD**

19 The Patent Local Rules “require parties to crystallize their theories of the case early in the
 20 litigation and to adhere to those theories once they have been disclosed.” *Fluidigm*, 2020 WL
 21 5073938, at *4 (citing *LG Electronics Inc. v. Q-Lity Computer Inc.*, 211 F.R.D. 360 (N.D. Cal.
 22 2002)). The rules “replaced the bone-crushing burden of scrutinizing and investigating discovery
 23 responses with the parties’ infringement and invalidity contentions. And, just as important, the rules
 24 ‘requir[ed] both the plaintiff and the defendant in patent cases to provide early notice of their
 25 infringement and invalidity contentions.’” *Id.*

26 Pursuant to Patent Local Rule 3-6, a plaintiff may only amend its infringement contentions
 27 “by order of the Court upon a timely showing of good cause.” To prevent the “vexatious shuffling
 28 of positions,” courts subject motions to amend infringement contentions to a higher level of scrutiny

1 than similar motions to amend pleadings. *See Verinata Health, Inc.*, 236 F. Supp. 3d 1113 (“In
 2 contrast to the more liberal policy for amending pleadings, the philosophy behind amending claim
 3 charts is decidedly conservative, and designed to prevent the ‘shifting sands’ approach to claim
 4 construction.”) (cleaned up). Examples of circumstances that may support a finding of good cause
 5 include (a) a claim construction by the Court different from that proposed by the moving party, (b)
 6 recent discovery of material, prior art despite earlier diligent search, and (c) recent discovery of
 7 nonpublic information about the accused instrumentalities that was not discovered before the service
 8 of infringement contentions despite diligent efforts. P.L.R. 3-6(a)-(c).

9 A good cause inquiry “considers first whether the moving party was diligent in amending its
 10 contentions and then whether the nonmoving party would suffer prejudice if the motion to amend
 11 were granted.” *Radware, Ltd. v. A10 Networks, Inc.*, No. C-13-02021, 2014 WL 3725255, at *1
 12 (N.D. Cal. July 28, 2014) (internal quotations omitted). “The burden is on the movant to establish
 13 diligence rather than on the opposing party to establish lack of diligence.” *Karl Storz Endoscopy–*
 14 *America, Inc. v. Stryker Corp.*, No. 09–cv–00355, 2011 WL 5574807, at *1 (N.D. Cal. Nov. 16,
 15 2011) (citing *O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1366 (Fed. Cir.
 16 2006)).

17 When determining whether a party was diligent, “the critical question is whether the party
 18 could have discovered the new information earlier had it acted with requisite diligence.” *Radware*,
 19 2014 WL 3725255, at *1; *see also Fluidigm*, 2020 WL 5073938, at *4. Additionally, the court may
 20 deny a motion for leave to amend infringement contentions if it would cause ‘undue prejudice to the
 21 non-moving party.’” *Tech. Props. Ltd. v. Canon, Inc.*, No. 14-cv-03640-CW, 2016 WL 1360756,
 22 at *2 (N.D. Cal. Apr. 6, 2016) (quoting Patent L.R. 3-6). “Prejudice is typically found when
 23 amending contentions stand to disrupt the case schedule or other court orders.” *Verinata Health,*
 24 *Inc.*, 236 F. Supp. 3d at 1113 (internal quotations and citation omitted).

25 **V. ARGUMENT**

26 The Court should deny Sonos’s motion for leave for two reasons. *First*, Sonos was not
 27 diligent. Sonos’s contentions should have been disclosed in its original Patent Local Rule 3-1
 28 infringement contentions. The proposed amendments are based on source code that Google served

1 more than eleven months ago, and Sonos has not identified any *new* information or evidence that
 2 would warrant supplementation. *Second*, permitting Sonos to introduce new theories at this point
 3 would substantially prejudice Google. The patent showdown in its advanced stages and Sonos’s
 4 Motion is scheduled for a hearing just three weeks before the deadline for opening summary
 5 judgment briefs. Even if the Court were to grant Sonos’s Motion, the parties would have less than
 6 three weeks to revisit their claim constructions before incorporating them into the showdown
 7 summary judgment briefs.

8 **A. The Court Should Deny Sonos’s Motion For Leave To Amend Because Sonos’s**
 9 **New Theories Should Have Been Disclosed In Its Patent Local Rule 3-1**
 Disclosures And Are Not “Back-Up” Theories

10 In deciding whether there is good cause for leave to amend, “*the critical question* is whether
 11 the party could have discovered the new information earlier had it acted with the requisite
 12 diligence.” *Fluidigm*, 2020 WL 5073938, at *4 (emphasis added). In this case, the answer to this
 13 “critical question” is a resounding yes. Sonos’s proposed amendments should have been disclosed
 14 in its original Patent Local Rule 3-1 infringement contentions served in October 2021.

15 Sonos cannot point to any new materials or information on which its proposed theories are
 16 based—the additional theories are premised on the same source code and documents that Google
 17 made available to Sonos on March 5, 2021 (over eleven months ago). Nor can Sonos point to any
 18 unexpected claim construction positions that would justify the new amendments. At bottom, after
 19 Google selected claim 13 of the ’615 patent for the upcoming showdown, Sonos appears to have
 20 realized that its current theories are unsustainable and unfairly seeks to belatedly shift its position
 21 to add theories it could have identified earlier. This is not a basis for permitting amendment. *Apple*,
 22 2013 WL 3246094, *2 (“Nothing in [the Patent Local Rules] . . . suggests that infringement
 23 contentions are intended to be a running dialogue between the parties, with additions of theories as
 24 one side asserts that a particular argument is unsustainable.”). On the contrary, the Patent Local
 25 Rules obligate a plaintiff to “proffer *all* of the theories of infringement . . . that they in good faith
 26 believe *they can assert*” in their original infringement contentions. *Fluidigm*, 2020 WL 5073938,
 27 at *4 (citing *Apple*, 2013 WL 3246094, at *3) (emphasis in original).

1 This Court’s holding in *Fujifilm Corp. v. Motorola Mobility LLC*, No. 12-CV-03587-WHO,
 2 2015 WL 757575 (N.D. Cal. Feb. 20, 2015) is instructive. Fujifilm asserted that it had been diligent
 3 because it sought leave to amend after it realized for the “first time . . . that Motorola’s
 4 noninfringement positions would potentially require Fujifilm to rely on the doctrine of equivalents.”
 5 *Fujifilm Corp.*, 2015 WL 757575, at *7. This Court rejected this argument, holding that Fujifilm
 6 failed to show it could not have disclosed the proposed amendments earlier since “[t]he theories are
 7 based on the same structures in the same products that Fujifilm has for months asserted literally
 8 infringe” with the only difference being “that Fujifilm now contends that these structures, in addition
 9 to literally infringing, possess insubstantial differences with the disputed claim limitations and/or
 10 perform substantially the same function in substantially the same way to obtain substantially the
 11 same result.” *Id.* at *8. Like Fujifilm, Sonos “offers no explanation of why [its proposed] theories
 12 could not have been reasonably asserted at the beginning of this case,” and its reliance on Google’s
 13 construction positions “does not establish good cause for amendment.” *Id.*

14 The sole justification Sonos offers for its untimely amendments is a provision in the Case
 15 Management Order regarding the disclosure of “back-up contentions.” *See* Dkt. 67 ¶¶ 17-18
 16 (referencing *Fluidigm Corp.*, 2020 WL 5073938). However, Sonos’s reliance on this provision is
 17 misplaced. The Case Management Order does **not** permit a party to hold back infringement theories
 18 that should have been disclosed in a Patent Local Rules 3-1 contentions, and then spring them on a
 19 defendant under the guise of being “backup contentions” months later on the eve of the patent
 20 showdown.

21 Indeed, *Fluidigm*—the decision that the Case Management Order cites as providing “further
 22 explanation” regarding the “back-up contentions” provision—is entirely consistent with cases
 23 holding that a party must show that its amendments are based on “new information” it could not
 24 have previously discovered had it acted with the requisite diligence. In *Fluidigm*, a plaintiff served
 25 new infringement theories in its expert report and attempted to justify its untimely new theories by
 26 arguing that they were “back-up theories” in response to **unexpected** means-plus-function claim
 27 construction positions from the defendant. *Fluidigm Corp.*, No. C 19-05639 WHA, Dkt. 120 at 13-
 28 14. The Court held that plaintiffs cannot wait until expert reports to disclose these new theories,

1 and had “28 days *at the latest*” to serve “back-up contentions.” *Fluidigm Corp.*, 2020 WL 5073938,
 2 at *3 (emphasis added). The Court further explained that its decision furthers the “purpose of our
 3 patent local rules,” which requires parties to “crystalize their theories of the case early in the
 4 litigation and to adhere to those theories once they have been disclosed.” *Id.* at *3-4. Thus, *Fluidigm*
 5 makes clear that “back-up contentions” are those that a plaintiff serves in response to claim
 6 construction positions the party could not have anticipated—*e.g.*, the means-plus-function
 7 construction proposed by the defendant in *Fluidigm*. Theories that a plaintiff could have asserted
 8 in its Patent Local Rule 3-1 disclosures but chose to withhold are not back-up theories.

9 Here, by contrast, Sonos’s new contentions are not borne out of “unexpected” claim
 10 construction proposals from Google. *Sunpower Corp. Systems v. Sunlink Corp.*, No. C-08-2807
 11 SBA (EMC), 2009 WL 1657987, *1 (N.D. Cal. June 12, 2009) (denying leave to amend after claim
 12 construction ordered was entered because “[t]he risk of the construction rendered by the presiding
 13 judge was well known and anticipated by Defendant.”); *cf. Richtek Tech. Corp. v. uPI*
 14 *Semiconductor Corp.*, No. C 09-05659 WHA, 2016 WL 3136896, *1-2 (N.D. Cal. 2016) (“Patent
 15 Local Rule 3-6 expressly acknowledges that an **unexpected** claim construction ruling may, absent
 16 undue prejudice, support a finding of good cause.”) (emphasis added) (Alsup, J.). In fact, Sonos
 17 already served Google with a previous set of revisions to its infringement contentions on January
 18 20, 2022—more than a week **after** Google served its proposed claim constructions on January 10,
 19 2022. Hefazi Decl. ¶¶ 8, 9. Put another way, Google’s claim construction positions were already
 20 known when Sonos served its prior set of contentions, mooted any reason for Sonos to serve yet
 21 another set of infringement contentions now.

22 Further, Google’s proposed constructions did not add any new, unanticipated theories to this
 23 case. Sonos contends that Google’s construction adds a “uniform resource locator” or URL. But
 24 Sonos’s **own** proposed construction already covers this “URL,” so Sonos should have already
 25 accounted for all infringement theories in support of its own construction. No “backup” contentions
 26 should be necessary, as Sonos cannot dispute that its own proposed construction of the term
 27 “resource locator” encompasses a uniform resource locator. Its own claim construction expert
 28 confirmed this, opining that “a POSITA would have known that ‘resource locator’ more generally

1 refers to information that enables a device to access a resource and that information could take
 2 various forms, such as an identifier, address, *uniform resource indicator* (URI), *URL*, or some other
 3 reference that facilitates a device accessing a resource.” Ex. 4 ¶ 101; *see also* Ex. 5 (citing the ’615
 4 patent (Dkt. 51-1) at 11:62-12:3 as evidence for Sonos’s proposed construction) (“zone player may
 5 contain a uniform resource locator (URL) that specifies an address to a particular audio track in the
 6 cloud” and “[u]sing the URL, the zone player may retrieve the audio track from the cloud, and
 7 ultimately play the audio out of one or more zone players.”). Given that Sonos’s latest proposed
 8 theories of infringement fall within *both* Sonos’s and Google’s proffered constructions, “the
 9 difference [between the constructions] is not material and does not provide good cause to amend the
 10 contentions.” *Apple Inc.*, 2013 WL 3246094, at *5; *Nexus Display Techs., LLC v. LG Elecs., Inc.*,
 11 No. CV1405694JVSDFMX, 2016 WL 6916827, at *3 (C.D. Cal. July 8, 2016) (finding plaintiff
 12 was not diligent because “[t]here is no reason identified that these two signals from the DisplayPort
 13 standard could not have been identified as auxiliary data signals when Nexus propounded its original
 14 infringement contentions. . . . Instead, Nexus has *added* two additional data signals that Nexus
 15 suggests *also* satisfy this element of the ’328 Patent.”) (emphasis in original).

16 While Sonos’s proposed amendments attempt to accuse new functionalities in the YouTube
 17 applications that use URLs, Sonos has provided no explanation for why it omitted these theories
 18 from its existing contentions (or any of the numerous prior supplements). Sonos certainly knew
 19 how to advance theories based on URLs before Google served its proposed claim constructions on
 20 January 10, 2022. Indeed, Sonos’s prior contentions accuse functionalities in *other* accused
 21 products of infringing based on their use of identifiers and URLs—but not YouTube. For example,
 22 the functionality Sonos accused in the Google Play Music application in its October 2021
 23 contentions uses both URLs (specifically, “[REDACTED]”) and identifiers (“ItemIDs”), and Sonos has
 24 mapped both to the “resource locator” limitation. Ex. 6 at 59 (emphasis added) (served October
 25 21, 2021). Sonos’s decision to hold back its accusations against YouTube URLs while including
 26 this theory for other applications demonstrates that Sonos could have presented its proposed
 27 amendments affirmatively in its previous contentions, and that the new contentions are not actually
 28 “back-up” theories at all. *Fluidigm Corp.*, Dkt. 120 at 12 (permitting backup contentions “raised

solely in response to [new] proposed claim constructions”). Allowing Sonos to serve new infringement theories under the guise of “backup” contentions would promote gamesmanship by allowing plaintiffs to sandbag defendants and switch theories after claim construction.

Finally, Sonos’s assertion that it could not have offered its new infringement theories sooner because “Google had not previously sought construction for either of the[] terms” at issue while the action was in the Western District of Texas is misleading. Mot. at 2. Sonos has long known that Google disputed the disclosure of “resource locator” and “local playback queue” in Sonos’s current theories. For example, Google sent Sonos a letter on November 3, 2021 explaining that its contentions failed to disclose any functionality that met the “resource locator” and “local playback queue” limitations. Dkt. 86-3 at 3-5. Even after Google sought the Court’s assistance and Sonos was ordered to rectify these deficiencies through supplemental infringement contentions regarding these very terms, Sonos failed to do so. See Dkt. 99; *see supra* § III.C. In fact, Sonos served its operative set of infringement contentions in this case on January 20, 2022, *after Google served its claim constructions*. *See supra* Section III.C. Thus, Sonos “knew or should have known” of Google’s position regarding these terms “because of information exchanged earlier in the case.” *Nitride Semiconductors Co. v. RayVio Corp.*, No. 17CV02952EJDSVK, 2018 WL 4214983, at *2 (N.D. Cal. Aug. 6, 2018) (denying motion to infringement theories given plaintiff’s failure to demonstrate diligence). Sonos’s failure to disclose its proposed new theories in its initial contentions reflects Sonos’s lack of diligence and should end the inquiry.

B. Google Would Be Unduly Prejudiced By Sonos’s Late Amendment

Sonos’s request should also be denied on the independent ground that its proposed amendments would unduly prejudice Google in several respects.

1. Google Would Have Less Than Three Weeks Before the Patent Showdown Briefing Deadline to Respond to Sonos’s New Theories

Because Sonos’s proposed amendments relate to the claim that Google selected for the showdown (claim 13 of the ’615 patent), allowing Sonos to add multiple new infringement theories at this late date would severely impact Google’s ability to prepare for the upcoming patent showdown. *See* Dkt. 68 ¶ 1. Sonos acknowledges that opening summary judgment briefs for the

1 showdown are due in two months, but contends that this gives Google “sufficient time to respond”
2 to Sonos’s new contentions. Mot. at 3. Sonos is wrong. The patent showdown is already proceeding
3 on an expedited schedule, and introducing new theories that substantially broaden the case with just
4 two months to go is substantially prejudicial. That is especially true here where Sonos has claimed
5 in its damages disclosures that it is entitled to a reasonable royalty of [REDACTED] for its ’615
6 and ’033 patents. *See* Ex. 1. Sonos also neglects to mention that its Motion is noticed for hearing
7 on—and thus will not be resolved before—March 24, 2022, merely *three weeks* before the April
8 14, 2022 summary judgment deadline. *See* Dkts. 68 ¶ 4, 128.

9 Google will be severely prejudiced if it is forced to develop new defenses and invalidity
10 theories in less than three weeks before the first major patent showdown filing deadline, and just
11 two-and-a-half months before the summary judgment hearing and a potential trial on the selected
12 claims “prompt[ly]” thereafter. *Id.* ¶ 9; *see CyWee Grp. Ltd v. Apple Inc.*, No.
13 14CV01853HSGHRL, 2016 WL 7230865, at *3 (N.D. Cal. Dec. 14, 2016) (finding prejudice where
14 “[f]act discovery closes two weeks after the date of the hearing on th[e] motion to amend, and trial
15 is set to occur in [eight months]”); *Richtek Tech. Corp. v. uPi Semiconductor Corp.*, No. C 09-05659
16 WHA, 2016 WL 1718135, at *3 (N.D. Cal., Apr. 29, 2016) (denying leave to amend infringement
17 contentions because with eight months until trial, “it is time for the case to narrow, not expand”).

18 Furthermore, Google will also have been deprived of the opportunity to conduct discovery
19 regarding Sonos’s proposed amendments. Pursuant to Patent Local Rule 4-4, all discovery related
20 to claim construction—including depositions of any witnesses and experts—must be completed by
21 March 7, 2022, more than two weeks before the hearing on Sonos’s Motion. Had Sonos timely
22 disclosed its additional theories in its infringement contentions over three months ago, Google
23 “could have spent that time investigating the new theories, taking discovery, preparing responses,
24 and developing invalidity arguments within the new claim scope.” *Fluidigm Corp.*, 2020 WL
25 5073938, at *5.

1 **2. Google Based Its Claim And Term Selections on Sonos's Original**
 2 **Infringement Theories**

3 Permitting Sonos's amendments would allow Sonos to unfairly capitalize on the "shifting
 4 sands" approach to claim construction that the Patent Local Rules were precisely "designed to
 5 prevent." *Verinata Health, Inc.*, 236 F. Supp. 3d at 1113. Google selected its exemplary claim and
 6 its proposed terms for construction based on Sonos's original October 21, 2021 infringement
 7 contentions; it would be manifestly unfair to permit Sonos to now change course weeks before the
 8 patent showdown. *See Karl Storz Endoscopy-Am., Inc. v. Stryker Corp.*, No. 14-CV-00876-RS
 9 (JSC), 2016 WL 7386136, at *5 (N.D. Cal. Dec. 21, 2016) ("Stryker would be prejudiced here
 10 because it identified the claim terms that it wanted the district court to construe in reliance on the
 11 theories of infringement in KSEA's contentions."); *Advanced Micro Devices, Inc. v. LG Elecs., Inc.*,
 12 No. 14-CV-01012-SI, 2017 WL 2774339, at *5 (N.D. Cal. June 26, 2017) (finding proposed
 13 amendments prejudicial because LG chose its most important terms based on its understanding of
 14 plaintiff's original infringement contentions). "If [Sonos] had set forth different infringement
 15 theories (as it seeks to now), [Google] may very well have selected different terms for construction."
 16 *Karl Storz Endoscopy-Am., Inc.*, 2016 WL 7386136, at *5.

17 Sonos argues that Google would not be prejudiced because the Court's Case Management
 18 Order permits each party to move promptly to disclose any "back-up" contentions in response to the
 19 other side's proposed claim construction. But as discussed above, this rule was not meant to apply
 20 when the claim construction dispute is the result of Sonos's own failure to provide sufficient
 21 contentions regarding how the claim limitations are allegedly met. Sonos could have presented its
 22 new infringement theories with its original contentions, given that its *own* construction covers those
 23 theories. Sonos has already amended and supplemented its infringement contentions numerous
 24 times, such that the claims have "become a moving target against which [Google] must somehow
 25 mount a coherent defense." *Advanced Micro Devices, Inc.*, 2017 WL 2774339, at *5. The Court
 26 should not permit Sonos to do so for the eighth time—only a few weeks before summary judgment
 27 briefing, and for the very claim that Google selected for the showdown—under the guise of serving
 28 "backup contentions."

1 **VI. CONCLUSION**

2 For the foregoing reasons, Google respectfully requests that the Court deny Sonos's request
3 to amend its infringement contentions for the '615 patent.

4
5 DATED: February 22, 2022

QUINN EMANUEL URQUHART & SULLIVAN,
LLP

6
7 By: /s/ Charles K. Verhoeven

Charles K. Verhoeven (Bar No. 170151)

charlesverhoeven@quinnemanuel.com

Melissa Baily (Bar No. 237649)

melissabaily@quinnemanuel.com

Lindsay Cooper (Bar No. 287125)

lindsaycooper@quinnemanuel.com

50 California Street, 22nd Floor

San Francisco, California 94111-4788

Telephone: (415) 875-6600

Facsimile: (415) 875-6700

Attorneys for GOOGLE LLC

CERTIFICATE OF SERVICE

Pursuant to the Federal Rules of Civil Procedure and Local Rule 5-1, I hereby certify that, on February 22, 2022, all counsel of record who have appeared in this case are being served with a copy of the foregoing via the Court's CM/ECF system and email.

DATED: February 22, 2022

By: /s/ Charles K. Verhoeven
Charles K. Verhoeven